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Supreme Court, U.S.
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No. 97-660

In The

Supreme Court of the United States

October Term, 1997

GERALD R. WALKER,

Petitioner,

vs.

CONSOLIDATED BISCUIT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court review the standards for establishing a *prima facie* case of disability discrimination in a case in which the Petitioner failed to prove he was disabled, failed to rebut evidence that he was discharged for a legitimate nondiscriminatory reason, and where there exists no true conflict among the circuits in the statement of the *prima facie* case?

2. Should the Court review the Sixth Circuit's determination that, based upon the evidence before it, Petitioner failed to produce evidence sufficient to withstand summary judgment regarding the reason for his termination where the asserted error consists only of a claimed misapplication of a properly stated rule of law?

3. Should the Court review the Sixth Circuit's determination that Petitioner did not offer sufficient evidence to rebut Consolidated's legitimate, nondiscriminatory reason for terminating Petitioner where the asserted error consists only of a claimed misapplication of a properly stated rule of law?

LIST OF PARTIES

Respondent Consolidated Biscuit Company is an Ohio Corporation headquartered in Ohio. There are no parent or non-wholly owned subsidiary companies to be listed pursuant to Rule 29.6.

The parties are Gerald R. Walker, Petitioner, and Consolidated Biscuit Company, Respondent.

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All relevant opinions are included in the Appendix to the Petition.

JURISDICTIONAL STATEMENT

Petitioner prays for exercise of this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit's decision affirming the District Court's grant of summary judgment does not conflict with the decision of another United States Court of Appeals on the same important matter, nor does it decide an important federal question in a way that conflicts with relevant decisions of this Court or of a state court of last resort.

STATUTE INVOLVED

This case involves the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12101, *et seq.* Specifically, it involves Title I of the ADA, 42 U.S.C. §12112(a), which provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Petitioner's employment with Respondent was terminated on May 4, 1994, after he reported to work on May 2, 1994 under the influence of alcohol. (Petition at A13.) Petitioner sued Respondent alleging a violation of the ADA. On May 29, 1996, the district court determined that petitioner failed to set forth a *prima facie* case under the ADA, and that he failed to rebut Respondent's legitimate business reasons for terminating him. (Petition at A20-A36.)

On appeal, the Sixth Circuit affirmed the district court, finding that Petitioner had not set forth a *prima facie* case under the ADA, and, even if he had, that Respondent had articulated a legitimate, nondiscriminatory reason for terminating Petitioner, and that Petitioner failed to offer sufficient evidence to rebut Respondent's reason for terminating him. (Petition at A12-A19.)

A brief summary of the facts of this case is warranted. Petitioner was employed as a supervisor by Respondent, a food producer in McComb, Ohio. (Petition at A50.) He was terminated because, on May 2, 1994, he reported to work under the influence of alcohol, in violation of an established work rule. (Petition at A18-A19.) Several managers and supervisors interacted with Petitioner on May 2, 1994, and testified that he spoke with slurred speech, staggered, talked loudly, was profane, was aggressive, "talked bravely," acted belligerently, looked drunk, had difficulty walking, and smelled of alcohol. (Petition at A15-A16.) Petitioner denied that he

was under the influence of alcohol, and instead claimed that he was suffering from back pain and lack of sleep. (Petition at A16.) Petitioner does not deny that he used profanity, spoke with slurred speech, talked loudly, acted belligerently, and he smelled of alcohol. (*Id.*)

Petitioner claims that he was widely and erroneously regarded by Respondent employees as suffering from alcoholism. (Petition at A13.) He claims that he is not an alcoholic, but that he suffers from rosacea – a skin condition that causes blotchy skin and an enlarged nose – and that this condition caused a number of Respondent employees to regard him as an alcoholic. (Petition at A49.) It is undisputed that Respondent employees believed Petitioner suffered from a drinking problem. (Petition at A13-A14.) Nonetheless, Respondent's termination of Petitioner stemmed from the fact that he reported to work exhibiting signs of intoxication (i.e. slurred speech, belligerent attitude, odor of alcohol, difficulty walking), not because his skin was blotchy or his nose was red or enlarged. (Petition at A15-A16.)

ARGUMENT

A. QUESTION ONE: PETITIONER'S ASSERTION THAT THE SIXTH CIRCUIT STATED THE WRONG *PRIMA FACIE* TEST DOES NOT WARRANT SUPREME COURT REVIEW.

1. The Sixth Circuit Has Repeatedly Stated The Correct *Prima Facie* Test.

Petitioner asks this Court to review the *prima facie* standard for establishing a claim of discrimination under the ADA, claiming that the Sixth Circuit's use of the sole cause requirement in the *prima facie* case is error, and in contrast with other circuits.

Respondent admits that the Sixth Circuit, in this case, stated a *prima facie* case different from the one it typically employs, including the sole cause requirement. (Petition at A16.) The sole cause requirement should not be included in the *prima facie* case. Where one has proved that the sole cause of an adverse employment action was his or her disability, one has met his or her ultimate burden of proof in an ADA case. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996) (distinguishing among the elements required to be proven, the burden in direct evidence cases, and the burden in indirect evidence cases). Indeed, in the instant case, the Sixth Circuit purports to import the *prima facie* test from its decision in *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996), but a careful review of that case demonstrates that the court was stating the ultimate burden of proof rather than the *prima facie* case. *Roush*, 96 F.3d at 843. The issue of sole cause is not relevant at the *prima facie* level.

The *prima facie* test set forth in the Sixth Circuit's opinion is not the test that is usually set forth by the Sixth Circuit in ADA cases. For example, in *Monette*, the Court stated that, in order to prove a *prima facie* case, a plaintiff must establish that he or she is disabled; that he or she is otherwise qualified for the position, with or without reasonable accommodation; that he or she suffered an adverse employment decision; that the employer knew or had reason to know of the plaintiff's disability; and that the position remained open while the employer sought other applicants or the disabled individual was replaced. *Monette*, 90 F.3d at 1186. This test has also been set forth and applied in *McKay v. Toyota Motor Mfg., U.S.A.*, 110 F.3d 369 (6th Cir. 1997); *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997); and *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876 (6th Cir. 1996), none of which contain the "sole cause" requirement included in the *prima facie* case set forth by the Sixth Circuit in the instant case.

Thus, while the Sixth Circuit may have misstated its own test in the instant case, that test has not been used before or since by the Sixth Circuit. It is unnecessary for this Court to review this case solely for the purpose of correcting the misstatement of the *prima facie* case. The misstatement is of no precedential value given that the Sixth Circuit has, both before and since its opinion in the instant case, stated the *prima facie* case correctly, and given that the instant case is not a reported case. Moreover, as demonstrated herein, the misstatement was not relevant to the ultimate outcome of this case.

2. Regardless Of How The *Prima Facie* Case Is Stated, Respondent Has Not Met It.

Regardless of how the *prima facie* case of disability discrimination is defined, Petitioner cannot meet that test. That is because *any prima facie* case of disability discrimination, even the misstatement set forth in the Sixth Circuit's opinion in this case, contains as its first element the requirement that the plaintiff prove that he or she is disabled. Petitioner failed to establish either a disability or a perceived disability.

Petitioner claims that, because he suffered from rosacea, he was perceived by Respondent as having the substantially limiting impairment of alcoholism. As the district court in this case held, Petitioner pointed to nothing in the record indicating that the Respondent perceived or considered alcoholism *per se* to be a substantially limiting impairment. (Petition at A31.) While Respondent did have policies regarding alcohol, each of those policies, positions or statements related to alcohol *use*, as opposed to alcoholic *status*. (*Id.*) Federal law expressly provides that an employer may prohibit the use of alcohol at the workplace by all employees, and may prohibit employees from appearing at work under the influence of alcohol. 42 U.S.C. §12114(c)(1) - (2). Thus, as the district court correctly concluded, Petitioner is not an "individual with a disability" pursuant to the ADA. (Petition at A31.) Consequently, this Court should not review this case to refine or correct the Sixth Circuit's statement as to what constitutes a *prima facie* case when, whatever the *prima facie* case, Petitioner cannot establish

it because he is not disabled and was not perceived as disabled within the meaning of the ADA.

3. Even If Petitioner Had Set Forth A *Prima Facie* Case Of Disability Discrimination, His Case Nonetheless Fails On Summary Judgment.

The entire issue of the elements of a *prima facie* case is moot in the instant action. This is because the Sixth Circuit held that, even if Petitioner had established a *prima facie* case of disability discrimination, summary judgment was nonetheless warranted because Petitioner failed to offer sufficient evidence to rebut Respondent's proffered explanation for its decision to terminate him. (Petition at A19.) This Court has stated that " '[i]f the defendant carries the burden of production, the presumption raised by the *prima facie* case is rebutted,' *[Texas Dept. of Community Affairs v.] Burdine*, 450 U.S. [248,] 255 [(1981)], and 'drops from the case,' *id.* at 255, n. 10." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Therefore, when the argument proceeded to the subject of Respondent's legitimate, nondiscriminatory reason for firing Petitioner, the *prima facie* case issue dropped from the case and was no longer of any import. Even if there was a misstatement of the *prima facie* case by the Sixth Circuit, it is mooted by the fact that the Sixth Circuit addressed the issue of Respondent's legitimate, nondiscriminatory reason for terminating Petitioner. Thus, if this Court reviewed this case, set forth a new *prima facie* case, and remanded the case, the outcome would be the same; because Petitioner did not rebut Respondent's

legitimate, nondiscriminatory reason for terminating Petitioner, summary judgment in favor of Petitioner would be warranted.

B. QUESTIONS TWO AND THREE: THERE IS NO REASON FOR THIS COURT TO REVISIT THE SIXTH CIRCUIT'S FINDING REGARDING WHETHER PETITIONER SUBMITTED SUFFICIENT EVIDENCE TO DISCREDIT RESPONDENT'S LEGITIMATE NONDISCRIMINATORY REASON FOR TERMINATING HIM.

In his second and third questions presented for review, Petitioner asks this Court to review the issues of whether he presented sufficient evidence that he was discharged because of a perceived disability and whether the evidence he submitted was sufficient to rebut Respondent's legitimate nondiscriminatory reason for terminating him. Neither of these issues merits review by this Court.

Both of these issues relate to the portion of the burden shifting analysis that occurs after a plaintiff has established a *prima facie* case of discrimination. The employer is then required to "articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The plaintiff, who bears the burden of persuasion throughout the entire process, then must demonstrate that the proffered reason was not the true reason for the employment decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In the instant case, Respondent identified a legitimate, nondiscriminatory reason for terminating Petitioner: Respondent believes that on May 2, 1994, Petitioner reported to work under the influence of alcohol. This belief is based upon the testimony of several employees who witnessed Petitioner exhibiting the typical behaviors of an intoxicated person. The ADA provides that employers "may prohibit . . . the use of alcohol at the workplace by all employees" and "may require that employees . . . not be under the influence of alcohol at the workplace." 42 U.S.C. §12114(c). Thus, termination of an employee for reporting to work under the influence of alcohol constitutes a legal, legitimate and nondiscriminatory reason for termination.

Having met its burden of production, the Petitioner was then required to rebut the proffered legitimate, nondiscriminatory reason either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 517 (1993) (*citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 256 and *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804-805). To do so, Petitioner relied upon his own affidavit that he was not intoxicated on the day in question, and the affidavit of a co-worker that he was not intoxicated on the day in question. (Petition at A63-A68.) The Sixth Circuit and the district court both found this evidence unavailing.[1] (Petition at A19, A31-A33.)

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[1] The reason for such a finding is apparent: Petitioner's denials and his co-worker's impressions do not constitute

There is simply no reason for this Court to review the determination that Petitioner failed to offer sufficient evidence to rebut Respondent's legitimate, nondiscriminatory reason for terminating him. This Court rarely grants a petition for writ of certiorari where the asserted error consists of the misapplication of a properly stated rule of law. S.Ct. Rule 10. The Sixth Circuit correctly identified the burden shifting analysis to be employed if a plaintiff has set forth a *prima facie* case. (Petition at A16-A17, A19.) This Court need not review the Sixth Circuit's application of that rule of law to the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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evidence that Respondent considered alcoholism, as opposed to alcohol *use*, to be a substantial threat to an employee's job performance. (Petition at A33.) Moreover, the issue is not whether Petitioner was intoxicated, but whether Respondent's belief that he was intoxicated was the reason for the termination.